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In the Supreme Court of the United States

OCTOBER TERM, 1993

OREGON WASTE SYSTEMS, INC.;
GILLIAM COUNTY, OREGON; AND
COLUMBIA RESOURCE COMPANY, L.P.,

Petitioners,

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF OREGON AND
ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON,

Respondents.

On Petitions for a Writ of Certiorari to the Supreme Court of the State of Oregon

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Assuming that the proceeding below and the record available for review are not too limited for meaningful resolution of the federal issue, the question presented would be:

> Whether a state surcharge on out-of-state solid waste constitutes a *per se* Commerce Clause violation even though the fee has an express nexus to actual costs incurred by the State and therefore has a discernible basis for its imposition apart from the origin of the waste.

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OREGON WASTE SYSTEMS, INC.; GILLIAM COUNTY, OREGON; AND COLUMBIA RESOURCE COMPANY, L.P.,

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On Petitions for a Writ of Certiorari to the Supreme Court of the State of Oregon

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RESPONDENTS' BRIEF IN OPPOSITION

REASONS TO DENY THE WRIT

I. Introduction.

Petitioners have filed separate petitions for certiorari seeking review of the Oregon Supreme Court's decision in *Gilliam County v. Dept. of Environmental Quality*, 316 Or. 99, 849 P.2d 500 (1993) (*Gilliam County*).[1] In its decision, the Oregon Supreme

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[1]One petition is filed by Oregon Waste Systems, Inc. and Gilliam County, State of Oregon (No. 93-70). The other is filed by Columbia Resource Company, L.P. (No. 93-108). The State combines its response to the petitions. The essential issue presented by the two petitions is largely the same. The petitions differ primarily in that the petition filed by Columbia Resource Company raises arguments relating to an alleged "protectionist effect" of the challenged Oregon rule, arguments that were never presented to the Oregon

(continued...)

Court rejected a facial challenge to a state statute and administrative rule authorizing a surcharge on out-of-state solid waste deposited at Oregon landfills. The statute and the fee it authorizes are part of a comprehensive scheme regulating solid waste, which includes extensive provisions authorizing the recovery of costs at each step of the solid waste control program.[2] By statute, the fee is based on the actual costs to the State (and its political subdivisions) of disposing of out-of-state solid waste. These costs are not otherwise covered by fees and assessments relating to solid waste disposal generally, domestic solid waste disposal, and household hazardous waste disposal. *Id.*, 316 Or. at 102; Or. Rev. Stat. § 459.298.

The Oregon Supreme Court concluded that the fee has an "express nexus" to actual costs incurred and a discernible basis apart from the waste's point of origin. The court therefore concluded that the statutory fee does not, on its face and *per se*, impermissibly discriminate against interstate commerce. *Id.*, 316 Or. at 111–12. The state court left open the question whether the challenged fee might violate the Commerce Clause in other ways, as, for example, because the fee is higher than the actual costs incurred by disposal of out-of-state waste or is in some other way "disproportionate." *Id.*, 316 Or. at 112–13. The court concluded that the procedure invoked by petitioners to test the fee was too limited in form to reach such a challenge or any claim that might require a more fact-based inquiry or one that goes beyond the face of the administrative

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[1](...continued)

courts and that are not properly presented for the first time to this Court. *See* discussion *post* at p. 13 and n. 10.

[2]Both the Oregon Supreme Court and Oregon Court of Appeals opinions refer generally to the comprehensive scheme of which the challenged statute and rule are but a part. *See generally Gilliam County v. Dept. of Environmental Quality*, *supra*, 316 Or. at 109, n.10; *id.*, 114 Or. App. 369, 381–82, n.14, 837 P.2d 965 (1991).

rule establishing the fee and its authorizing statute. *Id.*, 316 Or. at 113.

The question decided by the Oregon Supreme Court is important to Oregon and possibly to other States. As this response will demonstrate, however, this is not the case in which, or the record on which, the question should be resolved for the first time by this Court. Below, petitioners availed themselves of a particularly expeditious and exceptionally narrow administrative procedure that began as an original declaratory action at the appellate court level. The case provides the Court with relatively little in the way of a factual record for review, and nothing in the way of an actual controversy between the parties over anything but the most academic of questions. The abstract and sterile posture of the case promises to raise more questions than it answers. The issues petitioners seek to have the Court resolve by granting certiorari in this case are better left to other lawsuits now in progress or to other cases in which this same question may later arise.

II. The Limitations of the Proceeding Below Render the Issue Presented Too Abstract for Meaningful Review.

The fee petitioners challenged in this case is a combined product of statute and administrative rule. The relevant statutes, Or. Rev. Stat. §§ 459.297 and 459.298, require the Oregon Environmental Quality Commission (EQC) to assess a surcharge on all solid waste generated out-of-state and deposited at Oregon landfills. The amount of the surcharge must be based on the actual costs to the State and its political subdivisions of disposing of the out-of-state waste. Consistent with its statutory charge, the EQC promulgated rules setting the per-ton surcharge at $2.25. Or. Admin. R. 340-61-120(6).

To challenge the surcharge on out-of-state generated waste, petitioners availed themselves of an expedited and limited form of administrative rule review available under the Oregon Administrative Procedures Act (Or. Rev. Stat. ch. 183). Oregon permits

challenges to administrative rules through original "rule review" actions in the Oregon Court of Appeals. Or. Rev. Stat. § 183.400. Significantly, under Oregon's special statutory procedure, "any person"[3] may challenge the validity of an administrative rule. Or. Rev. Stat. § 183.400(1). One who wishes to challenge a rule through this vehicle need not suffer any injury or have any direct stake in the rule and its validity. The scope of the court's review is narrow. Judicial review is limited to an examination of: (1) the challenged rule; (2) the statutory provisions authorizing the rule; and (3) the documents showing compliance with applicable rule-making procedures. Or. Rev. Stat. § 183.400(3). With only one exception not applicable here, there is no mechanism for adjudicating factual issues or disputes.[4] Thus, judicial review of a rule pursuant to this special administrative procedure is narrowly circumscribed: it is "limited to the face of the rule and the law pertinent to it. Numerous individual fact situations can arise under any rule, but judicial review of the rule as applied to each of those situations is reserved to other forums." *AFSCME Local 2623 v. Dept. of Corrections*, 315 Or. 74, 79, 843 P.2d 409 (1992); *accord Gilliam County, supra*, 316 Or. at 113. The only relief the appellate court may grant is a declaration that the rule violates state or federal constitutional provisions, the rule exceeds the agency's statutory authority, or the agency adopted the rule without proper compliance with rule-making procedures. Or. Rev. Stat. § 183.400(4).

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[3]"Person" is defined broadly to include any individual, partnership, corporation, governmental subdivision or public or private organization of any character, other than an agency. Or. Rev. Stat. § 183.310(7).

[4]The Oregon Court of Appeals has authority to appoint a special master for the limited purpose of resolving disputed allegations concerning irregularities in the procedure relating to a rule's adoption. Or. Rev. Stat. § 183.400(5). That is the sole circumstance in which the appellate court may take evidence and make findings of fact.

In electing to proceed under this statute, petitioners chose the most limited possible judicial forum for their challenge, one which produced the most limited possible record. They declined to pursue any of the available state or federal court remedies that would have permitted a full examination of the fees and costs assessed on in-state as well as out-of-state waste. They thus avoided any inquiry into the relative economic burdens on in-state and out-of-state waste, and they escaped any realistic assessment of whether the challenged fee in fact has an anti-competitive effect. Additionally, petitioners used the one forum or form of action that did not require them to assert some real stake in the outcome of the challenge, an inquiry that would have revealed actual injury if any has occurred and might have demonstrated a real and substantial discriminatory burden on interstate commerce, if any exists.[5]

A. *Review would be hampered by uncertainty whether petitioners have standing to raise their claim in federal court.*

Petitioners' standing to press their claims in federal court is at best uncertain, for they were not required in state court to show any actual injury and the record in fact reflects none. Nor is there any

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[5]Petitioners by-passed the opportunity to challenge the fee in federal district court, state trial court and other state forums which could have produced a factual record on standing, the economic burdens on in-state waste and injury to petitioners' interests. For example, petitioners could have brought an action in either state or federal court under 42 U.S.C. § 1983. Also, because petitioners could have challenged the validity of the authorizing statute on the same theory that they attacked the implementing rule, they could have brought their challenge in the state trial courts. *See generally Hay v. Dept. of Transportation*, 301 Or. 129, 719 P.2d 860 (1986). Petitioners also had available to them administrative remedies in which their challenge could have been adjudicated in the context of a more fully developed record. *E.g.*, Or. Rev. Stat. § 183.410 (declaratory procedure in which agency may determine the applicability of its own rules to any person, property or state of facts); Or. Rev. Stat. §§ 183.415 and 183.450 (full adjudicatory hearing procedures available when agency enforcement of a rule or statute gives rise to an actual controversy between the agency and a person).

reason why standing would be presumed. Petitioners must, however, be able to demonstrate that they have suffered or are threatened with injury by the operation of the rule they challenge to have standing to challenge the fee in the federal courts. *County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1667 (1991); *Allen v. Wright*, 468 U.S. 737, 751 (1984).

Petitioners are distinct entities with distinct interests. Petitioner Oregon Waste Systems, Inc. (OWS) owns and operates an in-state regional solid waste disposal facility known as the Columbia Ridge Recycling Center and Landfill. Petitioner Gilliam County is a political subdivision of the State of Oregon, and the county in which OWS's landfill is located. Petitioner Columbia Resource Company (CRC) has a 20-year contract with a county in the State of Washington, under which it disposes of solid waste originating in that out-of-state jurisdiction. CRC uses the Finley Buttes Landfill in yet another Oregon jurisdiction (Morrow County) as its disposal site. *Gilliam County, supra,* 316 Or. at 103, n. 1 (quoting description of petitioners' "interests" from Court of Appeals' opinion). In short, the record shows only that petitioners are: (1) an in-state landfill that is obligated to collect the surcharge on waste generated out-of-state; (2) the Oregon county in which the landfill is located; (3) a corporation that has a long-term contract to dispose of out-of-state waste and that uses a landfill located in another Oregon county for that purpose.

Beyond establishing those few facts, the record is silent. The in-state landfill (OWS) has neither alleged nor shown a loss of business from the surcharge on out-of-state waste. No loss is inevitable, for there is nothing in the record to reveal the cost of dumping solid waste in landfills in nearby states. As a consequence, there is nothing to suggest that the fee renders the in-state landfill less competitive than landfills in other states or that any solid waste has been or is likely to be diverted to out-of-state competitors. For

the same reason, there is no suggested or likely injury to petitioner Gilliam County, whose interest in the litigation appears to derive primarily from the in-county jobs the landfill generates.[6] Moreover, to the degree petitioners contend that Oregon residents realize an advantage because they do not pay the same surcharge for the disposal of in-state waste, the argument suggests that the in-state landfill and the county may be benefited rather than hurt by the fee structure because Oregonians will have an incentive to dispose of all of their waste in-state rather than to send it to out-of-state landfills. That claim, if true, perhaps could be presented by a competing out-of-state landfill, but it is difficult to see how it can be presented by any party now before the Court.

The record is equally bereft of any claim or showing that CRC, the company engaged in transporting out-of-state waste to an Oregon landfill, has suffered or inevitably will suffer any injury. Nothing suggests that CRC pays the surcharge for out-of-state waste directly, as opposed to passing the cost on to its customers. Nor has there been any allegation of lost profits or business of any kind. Rather, in its petition, CRC posits speculative injuries to hypothetical third persons, an effort apparently designed to demonstrate to the Court that Oregon's surcharge on out-of-state waste must work an injury to someone's commercial interstate interests somewhere. CRC Pet. Cert. pp. 23–26. The very resort to such hypotheticals, however, suggests that CRC itself suffers no injury or loss as a result of the Oregon fee. Indeed, CRC's arguments tend if anything to refute that suggestion. By pointing to the presumed burden on

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[6]Petitioner Gilliam County's asserted interest in this litigation is that the landfill located within its boundaries provides direct and indirect benefits to the county as a result of employment in the county and the payment of local fees and taxes. OWS Pet. Cert. 7. Significantly, however, there is no allegation that those interests have been in any way harmed by the surcharge in question, nor did there need to be for purposes of Gilliam County's ability to be a named party to the state administrative rule review procedure.

Washington residents who produce and must dispose of their own solid waste, CRC suggests that it does not pay the added surcharge, but instead that the surcharge is passed on to others. In any event, the existence of such injured third parties is pure conjecture in this case. "Unadorned speculation" is not a sufficient basis to invoke federal judicial power. *Diamond v. Charles*, 476 U.S. 54, 66 (1986). Nor is there any reason to permit this petitioner to assert the interests of others who appear to be fully capable of doing so themselves. *Id.*, at 65–66 (litigant may not assert the rights of presumably competent third parties).

This court's review of the question petitioners seek to present thus would be plagued by questions of standing that have never been addressed or answered in this litigation, because they did not have to be for purposes of the state court's review. On the basis of the limited record before the Court, petitioners' standing is both uncertain and difficult to resolve.

B. *The Oregon Supreme Court's narrow holding is unremarkable given the limited context of the challenge.*

The lack of a record on standing points to an equally troubling void: there has been no showing (and no effort to show) any actual impact on interstate commerce. On the basis of this record, the effects of the Oregon surcharge on interstate commerce are both unknown and unknowable. The Court has stressed that the "critical consideration" in Commerce Clause cases is the actual effect of the challenged enactment. *Brown-Forman Distillers v. New York Liquor Authority*, 476 U.S. 573, 579 (1986). In this case, the Court would be left to determine the "practical operations" of Oregon's rule in a vacuum, *see Maryland v. Louisiana*, 451 U.S. 725, 755 (1981), or to leave a more complete resolution of the challenge to another day.

The Oregon Supreme Court's holding is narrow and limited, notwithstanding petitioners' attempts to make it appear broad-

reaching. The state court had before it only the specific administrative rule setting the amount of the surcharge and the authorizing statute. The record and scope of the proceeding did not permit a meaningful examination of the fees, assessments, taxes or other burdens on in-state waste producers. That void was pointed out most sharply by the Oregon Court of Appeals (the level at which the review originated), where the court observed that it was impossible to compare the costs to in-state and out-of-state waste producers because of the limitations of the procedure petitioners chose for their challenge. *Gilliam County v. Dept. of Environmental Quality*, 114 Or. App. 369, 387, 837 P.2d 965 (1992).[7] The Oregon Supreme Court similarly was constrained by the narrow scope of the proceeding and the limitations of the record before it. *Gilliam County*, *supra*, 316 Or. at 112–13.

Thus, nothing before the state courts established the relative burdens on in-state and out-of-state commercial interests. The proceeding was devoid of anything that would permit the court to assess whether the surcharge on out-of-state waste results in an economic disadvantage for out-of-state waste producers.[8] Of course, had the proceeding been one in which a party challenging

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[7]The Court of Appeals observed:

> We cannot discern, from a facial review of the rules and legislation whether, in the aggregate, in-state garbage ultimately "pays" all of the costs that the state and its political subdivisions incur to manage and regulate its disposal. However, it does show that EQC is expressly forbidden to impose fees on out-of-state waste that exceed the costs of management of that waste. The legislature has made it abundantly clear that it intends only to make "out-of-state generators pay their 'fair share' of the costs" and no more. *Chemical Waste Management v. Hunt*, *supra*, ___ US at ___ n 9.

Id., 114 Or. App. at 387.

[8]An uncharitable observer might conclude that petitioners chose the most limited possible forum available in an effort to be spared the necessity of attempting to demonstrate that the rule has any anti-competitive effects.

the fee had to demonstrate some actual injury, that threshold question might have been answered from the outset.[9] Instead, because of the limitations of the procedure pursued by petitioners to invalidate the fee, the Oregon courts were confronted with a particularly abstract question: does the Oregon fee on out-of-state waste necessarily and inherently discriminate against that out-of-state waste? Put another way, is the fee unconstitutional under any and all conceivable circumstances? Petitioners argued that the fee is *per se* invalid, because it applies only to out-of-state waste and it thus is based only on point of origin. In rejecting that argument, the Oregon Supreme Court did not purport to hold that the surcharge on waste generated out-of-state is valid under any set of circumstances. It merely held that the fee, on its face, is not unconstitutional given that it is directly tied to the costs of disposing of out-of-state waste and there is a "discernable basis for the charge apart from its origin." *Gilliam County*, *supra*, 316 Or. 112. That much seems unremarkable. *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 626–27 (1978). The state court expressly held open the other questions raised by petitioners, such as whether the fee is an accurate reflection of those costs or whether it is in some other way excessive.

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[9]That is especially true if standing requires not merely a showing of injury, but instead a showing of injury stemming from the allegedly discriminatory effect of the state surcharge. *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986)(to claim an antitrust violation, plaintiffs must prove more than injury; they must prove injury that flows from the anti-competitive effects of the alleged violation); *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977)(same). Here, for example, petitioners assert that Oregon should be obligated to apply the surcharge to both in-state and out-of-state waste, or not at all. Assuming Oregon were to apply the surcharge to in-state and out-of-state waste alike, the costs to CRC of bringing in solid waste generated in the State of Washington would remain the same. The in-state landfill (OWS) and the county in which it is located might suffer greater injury because in-state waste might be diverted to out-of-state landfills. Petitioners' injuries, if any, therefore appear to be a consequence of any surcharge assessed on the disposal of out-of-state waste, irrespective of whether it is also assessed on in-state waste.

C. *The question presented does not merit the Court's attention at this juncture.*

Contrary to the assertions in both petitions, the decision in this case is not squarely in conflict with the Seventh Circuit's decision in *Government Suppliers Consolidating Serv. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992) *cert. denied* 113 S. Ct. 977 (1993). The challenged disposal fee in that case and this one are similar in that they both involved surcharges on the disposal of out-of-state waste based on the costs incurred. The plaintiffs in the *Bayh* case, however, had demonstrated that the Indiana regulations on solid waste disposal (which included the challenged fee) had increased costs, diminished revenues and profits, and had caused out-of-state waste to flow to sites in other States. *Id.*, 975 F.2d at 1273–75. Moreover, the trial court concluded factually that the challenged Indiana provisions would eliminate the interstate transportation of solid waste to the State of Indiana. *Id.*, 975 F.2d at 1273. No facts of a similar nature were before the Oregon courts and the Oregon Supreme Court did not purport to declare how it would resolve the challenge in the face of similar evidence.

Nor does the Oregon Supreme Court's holding mark a renegade disregard of the Court's precedent in *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992), as petitioners OWS and Gilliam County attempt to suggest. They assert that Oregon's fee is "indistinguishable" from the fee challenged in *Chemical Waste* and that the Oregon Supreme Court's holding is nothing short of "amazing." OWS Pet. Cert. 2. Somewhat more realistically, petitioner CRC at least concedes that *Chemical Waste* involved "subtly different" facts, but asserts that the decision nevertheless should be directly controlling. CRC Pet. Cert. 8.

In fact, however, both the fee in question and the record before the Court in *Chemical Waste* were significantly different. The Alabama fee on out-of-state hazardous waste had no relationship to costs incurred by the deposit of out-of-state waste at local treatment

facilities. To the contrary, the trial court expressly concluded as a factual matter that the only basis for the additional fee on the out-of-state waste was its origin. *Id.*, 112 S. Ct. at 2014–15. The Oregon Supreme Court correctly recognized this key distinction. *Gilliam County, supra*, 316 Or. at 112. Moreover, *Chemical Waste*, like the Seventh Circuit's decision in *Bayh*, was decided on the basis of a fully developed record which permitted an examination of the actual effects of the Alabama fee. As this Court observed, the record established that the fee had plainly discouraged the full operation of the Alabama treatment facility that brought the lawsuit, and the volume of hazardous waste brought to the facility in fact had fallen "dramatically" to less than half of the volume it treated before the fee went into effect. *Id.*, 112 S. Ct. at 2014 and n. 4.

With the case in its current posture, therefore, the Court would be forced to one of two resolutions, neither of which is satisfactory. On the one hand, the Court could agree with petitioners that Oregon's fee is unconstitutional under any set of facts or circumstances, despite the fact that it is directly related to the costs that the state and its political subdivisions incur due to disposal of out-of-state waste in local landfills. Alternatively, the Court could conclude that the out-of-state fee is facially valid because of its nexus to actual costs, but that it nevertheless may be unconstitutional if it is excessive, disproportionate or has an anti-competitive or protectionist effect. That holding would leave for another day the ultimate resolution of petitioners' challenge, just as the Oregon courts were forced by petitioners' choice of procedure to leave such challenges to other lawsuits. The record in this case provides no basis to determine whether that the surcharge exceeds or is in some other way disproportionate to the costs incurred by the State in disposing of waste from out-of-state producers. Similarly, the record is inadequate to resolve any claim that the fee has an

economic protectionist effect, which is a never-before-advanced argument that CRC improperly injects into its petition for certiorari for the first time in this case.[10] To grant certiorari to render such a limited and abstract rule that will not fully resolve any challenge, including the challenge to Oregon's fee, would hardly be a worthwhile expenditure of the Court's resources.

D. *The issue presented, if it has the importance petitioners believe it has, will be better resolved on other records.*

Rather than determine the validity of Oregon's fee on the basis of the limited record and procedure before the Court, the Court should allow the issues to be sharpened and clarified, or fully resolved, by further consideration in lower courts. If, as petitioners claim, the Oregon court's decision necessarily presages a host of similar enactments, there will be no shortage of opportunities for the Court to attempt to refine the line between special fees attached to out-of-state articles of commerce based on legitimate distinctions and those that are based on patent discrimination against interstate trade. *See Chemical Waste Management v. Hunt, supra*, 113 S. Ct. at n. 5. The Court can better enter that arena and decide the "close cases," (*id.*, at n. 5 and n. 9), where the inquiry is not purely abstract, but is based on a fully developed record.

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[10]CRC argues that the fee is protectionist in several ways. It implies in its second question presented and in its statement of the case that the fee was specifically designed to reduce the flow of out-of-state waste into Oregon. CRC Pet. Cert. i, 2–3. It also argues that the fee shifts the economic burden of financing Oregon's solid waste program to interstate commerce. CRC Pet. Cert. 15. Finally, CRC's speculation about the fee's effects on various hypothetical businesses and out-of-state consumers of Oregon's landfill capacity represent protectionist-type claims. CRC Pet. Cert. 23–26. None of those arguments was made to the Oregon courts. To the contrary, the state expressly pointed out that "[petitioners] do not claim that the surcharge is protectionist in purpose or effect." Response to Allowance of Supreme Court Review at 4. That assertion was never disputed in the state courts. At most, petitioners sought to downplay the importance of protectionism in the Court's Commerce Clause jurisprudence. *See, e.g.*, OWS Pet. for Or. Sup. Ct. Review, 11–12, n. 3.

Indeed, that opportunity may arise soon enough in the context of the very fee petitioners challenge in this case. Petitioners have brought other lawsuits in state and federal court to test Oregon's surcharge on out-of-state solid waste.[11] Their complaints allege, in virtually identical language, the precise claim they ask the Court to review here: that by enacting and attempting to enforce the fee at issue in this case, Oregon discriminates against out-of-state generated waste, in violation of the Commerce Clause. Those cases will permit development of the record in a way that was necessarily precluded by the procedural limitations of the statutory procedure petitioners pursued here. Specifically, those lawsuits will permit: a determination whether the parties seeking to challenge the fee have an actual interest in the outcome of the lawsuit; a full examination of Oregon's regulation of both in-state and out-of-state solid waste; a comparison of the actual economic burdens placed on in-state and out-of-state waste producers; and an assessment of whether interstate commerce is in fact economically disadvantaged by the fee.

Oregon, perhaps together with other States, has an interest in a correct resolution of the basic question that underlies petitioners' challenge: under what circumstances and in what ways may a State attempt to recoup the costs it incurs by the disposal of out-of-state

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[11] *Oregon Waste Systems, Inc. v. Fred Hansen, in his Capacity as Director of the Oregon Dept. of Environmental Quality; State of Oregon Dept. of Environmental Quality; State of Oregon Environmental Quality Commission*, No. 93-804-FR (D. Or., filed July 2, 1993); *Columbia Resources Company v. Fred Hansen in his Capacity as Director of the Oregon Dept. of Environmental Quality; State of Oregon Dept. of Environmental Quality*, No. 93-768-JU (D. Or., filed June 25, 1993). *Morrow County, Inc. et al. and Oregon Waste Systems, Inc. v. Fred Hansen, in his Capacity as Director of the Oregon Dept. of Environmental Quality, et al.*, Case No. 91-CF-21 (Morrow County Circuit Court, filed March 7, 1991). Petitioners apparently do not believe that the decision of the Oregon Supreme Court in this case precludes presenting any aspect of their Commerce Clause claim to the federal court, a question that will have to be decided by the trial courts in these cases.

waste in local landfills? The problem here is that the Court would be forced to answer that question in a setting divorced from meaningful context. Oregon's justification for and interest in the fee cannot be satisfactorily explored, nor can the relative burdens on in-state and out-of-state commerce be accurately gauged. The sterile setting of this case would do little to advance a sound resolution of the constitutional principle at work. The Court should decline to review the question presented until it arises in a concrete setting and in the context of a fully developed record where the interests that hang in the balance are better articulated and defined. *Cf. Renne v. Geary*, 111 S.Ct. 2331, 2340 (1991) (Court would decline to decide issues of fundamental and far-reaching importance where the available record was amorphous and ill-defined).

CONCLUSION

The petitions for writ of certiorari should be denied.

Respectfully submitted,

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